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No. 95 - 1694

IN THE
Supreme Court of the United States
October Term, 1995

THE REGENTS OF THE
UNIVERSITY OF CALIFORNIA, et al.,

Petitioners,

v.

JOHN DOE, PH.D., and all others
similarly situated,

Respondents.

ON PETITION FOR A
WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(Respondents disagree with Petitioners' statement of the questions presented.)

1. Whether the Eleventh Amendment applies to the unique facts of this case, in which the United States Department of Energy will ***pay directly*** — not merely reimburse later — any damages awarded against the Regents of the University of California (as manager of the Lawrence Livermore National Laboratory).

2. Whether this case, with its unique factual setting, is a proper vehicle for resolving any conflicts that may exist among circuits in cases with distinctly different factual settings involving reimbursement, insurance, or the actual impact of judgments on state treasuries.

3. Whether, in an action under 42 U.S.C. § 1983, federal court protection of federal civil rights relating to federal security clearance procedures should be sacrificed to simplify Eleventh Amendment jurisprudence.

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OPPOSITION TO THE PETITION

Respondents JOHN DOE, Ph.D., and all others similarly situated, respectfully ask this Court to deny the Petition of the Regents of the University of California for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

1. ***Basis for Federal Jurisdiction in the District Court.***

Jurisdiction in the district court was based on 28 U.S.C. §§ 1331 and 1343(a) for civil rights actions arising under the Constitution and laws of the United States (federal security clearance regulations and 42 U.S.C. § 1983) and on 28 U.S.C. § 1332 for actions based on diversity of citizenship (breach of employment contract).

2. ***Material Facts***

Respondents strongly disagree with Petitioners' characterization of this case as a "contract action" (Petition for Certiorari ("Pet.") at 2). This is primarily a federal civil rights action under 42 U.S.C. § 1983 for violation of Plaintiffs' rights secured by the due process clause of the Fifth Amendment and DOE security clearance procedural regulations. Plaintiff Doe, a mathematical physicist, alleges that after he had accepted the offer of employment at the Lawrence Livermore National Laboratory ("LLNL"), the LLNL attempted to withdraw the offer and refused to employ him in any position. The LLNL did so because its personnel determined that Doe could not obtain a security clearance from the DOE in any period of time, reasonable or otherwise (Second Amended Complaint, ¶ 10). Plaintiffs further allege that federal law, including Executive Order 10865 and the DOE's security regulations, including those found in Title 10, Part 710 of the Code of Federal Regulations and the Department of Energy Acquisition Regulation (DEAR), provide that only the DOE may determine eligibility for a DOE security clearance, not any other entity such as the LLNL or its employees (Second Amended Complaint ¶ 11; see also App. at 4a-5a).

Plaintiffs also allege that the LLNL, Nuckolls, and the University of California have an ongoing and continuing policy or custom of considering the eligibility of an applicant for employment at the LLNL for a security clearance from the Department of Energy ("DOE"), and of refraining from hiring an applicant if Defendants believe he or she will not be able to obtain such a clearance in a reasonable time, all in violation of the foregoing federal law (Second Amended Complaint, ¶ 13).

In addition to his civil rights claim, Plaintiff Doe also alleged a diversity breach of contract claim, since he resides in New York (Second Amended Complaint, ¶¶ 18, 19, 4). However, the foundation of this action is the violation of federal civil rights, proof of which would entitle Plaintiffs to judgment, even if the University successfully withdrew its offer of employment to Doe. (Federal jurisdiction over the breach of contract claim is also provided by 28 U.S.C. § 1367(a) on supplemental jurisdiction.)

Petitioners correctly state that the District Court dismissed Doe's action against the University based on the Eleventh Amendment and that the Ninth Circuit reversed, focusing on a provision for indemnification in the agreement between the federal government and the University for operation of the LLNL (Pet. at 2-3). Erroneously equating indemnification with reimbursement, Petitioners fail to observe the true nature of that provision.[1]

Crucial to the Ninth Circuit's decision are the details of the indemnification provision, found in the "Contract

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[1] For example, section 2778 of the Civil Code of California distinguishes two kinds of indemnity: "1. Upon an indemnity against liability ..., the person indemnified is entitled to recover upon becoming liable; 2. Upon an indemnity against claims or demands, or damages, or costs ..., the person indemnified is not entitled to recover without payment thereof;"

between the United States of America and the Regents of the University of California (For the Management and Operation of the Lawrence Livermore National Laboratory), Modification No. M205, Supplemental Agreement to Contract No. W-7405-ENG-48." "Article XVII, CL. 4 - General Indemnity (Special)" thereof defines the manner in which the DOE will indemnify the University. (Petitioners' Appendix ("App.") at 36a-37a.) Subdivision (c) of the quoted clause provides as follows:

> (c) The Government shall ***pay directly*** and discharge completely all final judgments, including assessed costs and all costs and expenses of litigation and claims, including attorney fees, entered against the University and, when requested by the University, all claims which may be settled by agreement and approved by the Contracting Officer. [emp. added.]

"Pay[ing] directly" is not a form of reimbursement, as Petitioners repeatedly argue (Pet. at i, 9, 12, 14, 16-18, 20-21, 25, and 29), but a process in which the federal government itself pays money directly to a successful litigant without going through the University's treasury.[2] A letter

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[2] "Reimburse" is defined in Webster's Third New International Dictionary (1976) as follows (at 1914): "**1** : to pay back (an equivalent for something taken, lost, or expended) to someone : REPAY <costs shall be ... *reimbursed* from such funds —*U.S. Code*> **2** : to make restoration or payment of an equivalent to (as a person) : INDEMNIFY < ~ government employees for travel expenses> **syn** see PAY". Under its definition of "pay" (at 1659), this dictionary compares the following words under "**syn**": compensate, remunerate, satisfy, reimburse, indemnify, recompense, repay, and pay: "... REIMBURSE applies to the return of an exact equivalent for an expenditure <county charges are admitted, the state *reimbursing* the county in the amount of 75¢ a day for each person; patients financially able to pay are charged $3 a day —*Amer. Guide Series: Mich.*> INDEMNIFY applies to compensations for loss, damage, or injury <the insurance company *indemnified* him for his losses> ..."

to Plaintiff Doe dated "Nov 23 1993" from the DOE's Acting Deputy Manager for its San Francisco Operations Office emphasizes the DOE's full support of this litigation:

> Likewise, under the contract in existence at the time you filed your lawsuit, the Department did not have the contractual right to approve or direct the University and the Laboratory's defense against your action, and cannot direct that it be settled. However, absent clear and convincing evidence of bad faith or willful misconduct of the Laboratory Director, *the Department will bear the cost of defending the University and the Laboratory, and of any monetary judgment in your favor which may be rendered by the courts.* Therefore, we believe that we must await the outcome of your litigation and that it would be inappropriate to further comment on the merits of your case.

(Appendix I hereto at 3, emp. added). Neither the relevant clause of the Contract (App. at 36a-37a) nor the foregoing letter mentions "reimbursement" in any form.

Contrary to Petitioners' assertion (Pet. at 4), there are no relevant limitations on the foregoing provision for direct payment, since the cited "qualifications" apply only to subdivision (b), not to subdivision (c), *supra* ("[i]t is understood that the Government is obligated under this paragraph **(b)**, whether or not ..." [emp. added]), and there is no allegation of "bad faith or willful misconduct" in any event. Regarding the availability of DOE funds (Pet. at 4), Plaintiff Doe submits that a few years of his salary as a physicist is hardly enough to strain the budget of the DOE, which in any case has promised to "use its best effort to obtain such funds" (Article XVII, CL. 4 (d), App. at 37a).

Under "Factual Background", Petitioners cite several decisions of California Courts on the legal status of the University (Pet. at 3), but fail to mention *Regents of the*

University of California v. Aubry, 42 Cal.App.4th 579 (1966). There, the court held that the University is so different from other state agencies that, based on the same provisions of the California Constitution relied upon by Petitioners (Pet. at 3), it was exempt from the state's prevailing wage law. *Id.*, at 582. Quoting from another opinion, the court explained the strong independence of the University:

> "Article IX, section 9, grants the regents broad powers to organize and govern the university and limits the Legislature's power to regulate either the university or the regents. This contrasts with the comprehensive power of regulation the Legislature possesses over other state agencies."
>
> "The courts have also recognized the broad powers conferred upon the regents as well as the university's general immunity from legislative regulation. '"The Regents have the general rule-making power in regard to the University ... and are ... fully empowered with respect to the organization and government of the University ... ." [Citations.] "[T]he power of the Regents to operate, control, and administer the University is virtually exclusive. [Citations.]"' [Citations.] [¶] ... '[T]he University is intended to operate as independently of the state as possible. (See Cal. Const., art. IX, § 9.)' [Citation.] ..."

Id., 42 Cal.App.4th at 586. As a result, the University was exempt from a state statute of general application because the "UC may further its core educational function by not paying prevailing wages." *Id.*, at 591.

Petitioners also contend that "[a]ll of [the University's] property is property of the state" (Pet. at 3), but ignore the express provision of Article IX, section 9(f) of the California Constitution, cited by the Ninth Circuit below (App. at 8a):

> The Regents of the University of California shall be vested with the legal title and the management and disposition of the property of the university and of property held for its benefit and shall have the power to take and hold, either by purchase or by donation, gift, testamentary or otherwise, or in any other manner, without restriction, all real and personal property for the benefit of the university or incidentally to its conduct; ...

The legal independence of the University from the State of California explains why the latter, in 1978, actually had to convey property to the University it had obtained from the United States in 1873. *Moores v. Walsh*, 38 Cal.App.4th 1046, 1048 (1995). This independence is underscored by the Regents' own power to sell part of that property to private purchasers in 1993, *ibid.*, as well as the fact that the purchasers acquired no easement "because The Regents had no easement to convey." *Id.* at 1051. The State of California played no role whatsoever in the transactions between the University and these private parties.

3. *Proceedings Below*

Petitioners oversimplify the opinion of the Ninth Circuit below (Pet. at 7). While the majority did hold that "[s]tate liability for money judgment is the single most important factor in determining whether an entity is an arm of the state" (App. at 7a), it concluded that the "University is not entitled to Eleventh Amendment immunity, however, because the remaining factors, in addition to the first and most important factor, weigh against a finding of immunity" (App. at 8a). The Ninth Circuit analyzed the third, fourth and fifth factors as follows:

> The third factor weighs against immunity because the California Constitution grants the University "the power to sue and be sued." Cal. Const. art. 9, § 9(f). The fourth factor, whether the entity may take property in its own name, also weighs against immunity. The University is vested "with legal title and the management and disposition of the property of the university" and is given the "power to take and hold, either by purchase or by donation, . . . all real and personal property for the benefit of the university." *Id.* Finally, the fifth factor weighs against immunity because the California Constitution establishes a "corporation known as 'The Regents of the University of California.'" Cal. Const. art. 9, § 9(a).

App. at 8a. The Circuit found that only the second factor favored immunity, because "the regulation of public education is an important central government function" (App. at 8a). The Circuit concluded that (App. at 9a):

> The district court should have applied the five-factor analysis to this ***unique*** situation in which the Department [of Energy], and not the State of California, pays for any judgment rendered against the University in its management of the Laboratory. [emp. added],

and held (after citing cases) that (App. at 9a):

> [P]revious grants of immunity in contexts where the State of California is financially responsible for the University do ***not automatically*** translate into immunity in this ***unique*** situation. [emp. added]

Even the dissenting Circuit Judge conceded that "[i]n this case, these is a relatively clear indemnity agreement" (App. at 14a).

Petitioners strangely focus on "diversity jurisdiction", arguing that "[b]ecause the University was not considered part of the State, it was subject to the Court's diversity jurisdiction on Doe's contract claim" (Pet. at 7). Again, Petitioners ignore the fact that this case is primarily a federal civil rights action under 42 U.S.C. § 1983; Doe's contract cause of action, while invoking diversity jurisdiction, also falls within the supplemental jurisdiction provided by 28 U.S.C. § 1367(a). Petitioners' argument indicates that the Eleventh Amendment issue would disappear if diversity jurisdiction were not invoked.

Finally, Petitioners correctly state that suit was filed in June 1992, and that in May 1993 — almost a full year later — they moved to dismiss on Eleventh Amendment grounds (Pet. at 5-6). They fail to point out, however, that extensive discovery was conducted during this time, including an all-day deposition of Plaintiff Doe.

SUMMARY OF THE ARGUMENT

Fundamental to an understanding of the uniqueness of this case is the realization that the University is a mere facade for the DOE, which owns the Lawrence Livermore National Laboratory ("LLNL") and uses the good name of the University to attract talented scientists like Plaintiff Doe to work at the LLNL. Petitioners' argument would allow the University to shield the federal government and to deprive Respondents of the right to have their federal security clearance claim adjudicated by a federal court.

Also fundamental — and crucial — to this unique case is the provision of the Contract between the University and the DOE that requires the federal government to "*pay directly* and discharge completely all final judgments ... entered against the University [emp. added]" (App. at 36a, subdivision (c)). Despite Petitioners' assertions (Pet. at 9), this case involves neither reimbursement nor insurance, but direct payment of any judgment rendered against the University. Only one case cited by Petitioners, *Mascheroni v. Board of Regents of Univ. of Cal.*, 28 F.3d 1554 (10th Cir. 1994) (Pet. at 9, 10, 19), may involve a Contract similar to the foregoing, but that opinion just mentions the Contract in passing (*id.*, at 1556) and utterly fails to mention let alone discuss its provision for direct payment by the DOE. Petitioners' reliance upon cases involving food stamps, aid to families with dependent children, unemployment insurance benefits, and supplemental state-law claims are simply not apposite.

Since the instant case does not fall within either view of the Eleventh Amendment set forth by Petitioners (Pet. at 9), it is not a proper vehicle for deciding any purported conflict that may exist among the circuits. The majority opinion of the Ninth Circuit herein (App. at 1a-11a) is fully consistent with all applicable precedents and should not be re-examined or disturbed.

REASONS FOR DENYING THE PETITION

Introduction

The Eleventh Amendment is an anomaly among jurisdictional principles. Unlike subject-matter jurisdiction, it can be waived. *ITSI TV Productions v. Agricultural Associations and the California Exposition & State Fair*, 3 F.3d 1289, 1291 (9th Cir. 1993), citing this Court's opinion in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 n. 3, (1991). Unlike personal jurisdiction, it can be waived only expressly, and not by a mere general appearance nor even by engaging in extensive litigation. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). Adding to its complexity, Eleventh Amendment immunity may be raised at any time, even *sua sponte* by an appellate court after years of litigation, *Edelman*, 415 U.S. at 678 (see also *Mascheroni*, 28 F.3d at 1558-9), whereas subject-matter jurisdiction is ordinarily determined at the outset of litigation. See, e.g., *Topping v. Fry*, 147 F.2d 715, 718 (7th Cir. 1945). As a result, Eleventh Amendment issues are not for the intellectually lazy and often require detailed factual analyses for fair and accurate adjudication. See, e.g., *Kroll v. Board of Trustees of Univ. of Illinois*, 934 F.2d 904, 908 n. 2 (7th Cir. 1991) and *In re San Juan Dupont Plaza Hotel Fire Litigation*, 888 F.2d 940, 941, 943 (1st Cir. 1989); see also *Vaughn v. Regents of the Univ. of Cal.*, 504 F.Supp. 1349, 1353-54 (E.D.Cal. 1981) and *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1988) (five-factor analysis, applied by the Ninth Circuit herein (App. at 6a-7a)). The simplification proposed by Petitioners — which ignores the unique facts of this case — would result in the deprivation of Respondents' right to have federal courts decide federal constitutional questions relating to federal security clearance procedures.

Argument

I. THE ELEVENTH AMENDMENT DOES NOT APPLY TO THIS CASE BECAUSE NO STATE FUNDS ARE INVOLVED, SINCE THE DOE WILL PAY DIRECTLY ANY AWARD OF DAMAGES.

The following facts are not susceptible to reasonable dispute:

> (1) Only damages payable by the DOE are sought against the University (prospective injunctive relief is sought only against official-capacity defendants under 42 U.S.C.§ 1983);
>
> (2) The DOE will pay directly any judgment rendered against the University; and,
>
> (3) Any money paid to Plaintiff Doe in this lawsuit will never be in the treasury of the State of California nor that of the University.

It is well settled that prospective injunctive relief against official-capacity state defendants is not barred by the Eleventh Amendment. *Hafer v. Melo*, 502 U.S. 21,27 (1991), following *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n. 10 (1989); *Edelman*, 415 U.S. at 667; *Pennhurst*, 465 U.S. at 102-103; *Papasan v. Allain*, 478 U.S. 265, 276 (1986); and *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy*, 506 U.S. 139, 146, 113 S.Ct. 684, 688-698 (1993). Petitioners are well-aware of the significance of these authorities (Pet. at 24 n. 21). Therefore, the only arguable basis for Eleventh Amendment applicability is the purported money damage question.

Regarding money damages, this Court has established that "a suit by private parties seeking to impose a liability

which ***must*** be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman*, 415 U.S. at 663 (emp. added), followed in *Quern v. Jordan*, 440 U.S. 332, 337 (1979). More recently, this Court emphasized the importance of this factor in *Hess v. Port Authority Trans-Hudson Corp.*, ___ U.S. ___, 115 S.Ct. 394, 404 (1994):

> Moreover, rendering control dispositive does not home in on the impetus for the Eleventh Amendment: the prevention of federal court judgments that ***must*** be paid out of a State's treasury. ... Accordingly, Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations [emp. added, citing cases from the first, third, fifth and seventh circuits].

In the instant case, the Ninth Circuit agreed. After setting forth its "five-factor analysis" (App. at 6a-7a):

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property in its own name or only in the name of the state, and [5] the corporate status of the entity.,

the Court concluded that "[s]tate liability for money judgment is the single most important factor in determining whether an entity is an arm of the state" (App. at 7a). While most of Petitioners' authorities do not describe their analyses in terms of "factors", all which involve money damages appear to rely heavily if not solely upon the source of payment, and most follow *Edelman v. Jordan*, 415 U.S.

651 (1974), often citing page 663 or 665.[3] Therefore, the Eleventh Amendment applies only when a state's treasury is a source of funds to pay all of part of a money judgment.

With the foregoing in mind, we turn to Petitioners' assertion that "the circuits are split" on a particular Eleventh Amendment issue. Respondents, however, submit that the instant case is not relevant to any such split, so that granting certiorari here would not be appropriate.

II. THERE IS NO CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISION HEREIN AND THOSE OF OTHER CIRCUITS.

A. THIS CASE IS NOT A PROPER VEHICLE FOR RESOLVING ANY CONFLICTS THAT MAY EXIST AMONG THE CIRCUITS BECAUSE ITS SPECIFIC FACTS — DIRECT PAYMENT BY THE DOE — RENDER IT *SUI GENERIS* IN THE EXTREME.

Respondents emphasize that this case is unique beyond words. The majority opinion of the Ninth Circuit herein expressly recognized this uniqueness and correctly distinguished relevant precedents (App. at 9a, emp. added):

[3] See, e.g., *Bennett v. White*, 865 F.2d 1395, 1405, 1407-08 (3d Cir. 1989); *Brown v. Porcher*, 660 F.2d 1001, 1006-07 (4th Cir. 1981), cert. den. 459 U.S. 1150 (1983); *Cannon v. Univ. of Health Sciences*, 710 F.2d 351, 357 (7th Cir. 1983); *Doucette v. Ives*, 947 F.2d 21, 30 (1st Cir. 1991); *Esparza v. Valdez*, 862 F.2d 788, 794-95 (10th Cir. 1988); *Fernandez v. Chardon*, 681 F.2d 42, 59-60 (1st Cir. 1982); *In re San Juan Dupont Plaza Hotel Fire Litigation*, 888 F.2d 940, 942-45 (1st Cir. 1989); *Kroll v. Board of Trustees of Univ. of Illinois*, 934 F.2d 904, 908 (7th Cir. 1991); *Lujan v. Regents of the University of Cal.*, 69 F.3d 1511, 1522-23 (10th Cir. 1995); and *Paschal v. Jackson*, 936 F.2d 940, 942-44 (7th Cir. 1991), cert. den 502 U.S. 1081 (1992).

> The district court should have applied the four-factor analysis to this ***unique*** situation in which the Department, and not the State of California, pays for any judgment rendered against the University in its management of the Laboratory. It is true that the University has been granted Eleventh Amendment immunity in a number of cases. See, e.g., *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 257 (1934); *Thompson [v. City of Los Angeles]*, 885 F.2d [1439] at 1443 [(9th Cir. 1989)]; *B.V. Eng'g [v. U.C.L.A.]*, 858 F.2d [1394] at 1395 [(9th Cir. 1988)] (citing *Jackson [v. Hayakawa]*, 682 F.2d [1344] at 1350) [(9th Cir. 1982)]; *Vaughn v. Regents of the Univ. of Cal.*, 504 F. Supp. 1349, at 1351-54 (E.D. Cal. 1981). However, previous grants of immunity in contexts where the State of California is financially responsible for the University do ***not automatically*** translate into immunity in this ***unique*** situation. *Vaughn*, 504 F. Supp. at 1352-54 (examining the pertinent factors as they relate to the University in order to determine whether the University is entitled to Eleventh Amendment immunity, rather than ***blindly*** asserting immunity).

Note carefully that the controlling portion of the Contract between the DOE and the University submitted by Petitioners (App. at 36a-37a) does not mention "reimbursement" in any form. Therefore, this case, with its unique factual setting, is not a proper vehicle for resolving any conflicts that may exist among circuits in cases with distinctly different factual settings involving reimbursement, insurance, or the actual impact of judgments on state treasuries.

B. None of Petitioners' Authorities Conflicts with the Decision of the Ninth Circuit Herein.

Petitioners rely principally upon two classes of cases: those involving reimbursement by the federal government and those involving insurance. The first class of cases includes those involving federal-state benefit programs such as unemployment insurance ("UI") and aid to families with dependent children ("AFDC"). Since this Court has firmly established that partial federal funding of a benefit program does *not* impair Eleventh Amendment immunity, *Edelman*, 415 U.S. at 653, 673 and 678, no consideration need be given to the following cases cited by Petitioners: *Bennett v. White*, 865 F.2d 1395 (3d Cir. 1989) (AFDC); *Brown v. Porcher*, 660 F.2d 1001 (4th Cir. 1981), cert. den. 459 U.S. 1150 (1983) (UI); *Doucette v. Ives*, 947 F.2d 21 (1st Cir. 1991) (AFDC); *Esparza v. Valdez*, 862 F.2d 788 (10th Cir. 1988) (UI); and *Paschal v. Jackson*, 936 F.2d 940 (7th Cir. 1991), cert. den. 502 U.S. 1081 (1992) (UI). Any conflicts among these cases are not relevant, since, unlike the instant case, all involve at least some state funds. "[U]nemployment insurance was conceived as a joint effort among the states and the federal government." *Id.*, 936 F.2d at 942. In *Doucette*, 947 F. 2d at 29, the Eleventh Amendment issue was not even decided; the case was remanded for development "of underlying facts relating to the possibility and means of federal reimbursement". Note that Petitioners themselves characterize as reimbursement cases *Bennett* (Pet. at 14), *Brown* (Pet. at 13 — "recoup"), *Doucette* (Pet. at 16), *Esparza* (Pet. at 13 — "replenished"), and *Paschal* (Pet. at 9). In addition, *Esparza*, 862 F.2d at 795, held that "[i]mmunity should not depend on which aspect of a *state's tax base* it seeks to utilize" (emp. added). Since the federal government will pay directly any judgment rendered in the instant case, there can be no impact on California's tax base. Therefore, *Esparza* can hardly be said to conflict with the Ninth Circuit's decision herein.

Also included in Petitioners' first class of cases is the food stamp program, which is totally funded by the federal government except for half of a state's administrative costs. *Cotton v. Mansour*, 863 F.2d 1241, 1242 (6th Cir. 1988); 7 U.S.C. § 2025. "Here, the relief sought is solely retroactive and would impose direct administrate expenses on the State Treasury." *Cotton*, 863 F.2d at 1246. The statement in *Cronen v. Texas Dep't of Human Services*, 977 F.2d 934, 938 (5th Cir. 1992), that the source of funds is irrelevant, amounts to erroneous dicta, since all states fund administrative expenses. *Foggs v. Block*, 722 F.2d 933, 941 n. 6 (1st Cir. 1983) characterized these expenses as "de minimis", but was reversed on other grounds *sub nom. Atkins v. Parker*, 472 U.S. 115 (1985). *Robinson v. Block*, 869 F.2d 202, 214 n. 11 (3d Cir. 1989) did hold that federal funding defeated Eleventh Amendment immunity, but relied solely upon *Bennett v. White*, 865 F.2d 1395, 1408 (3d Cir. 1989), which specifically referred to "reimburse[ment] by the United States." Again, note that Petitioners themselves characterize as reimbursement cases *Cotton* (Pet. at 16 n. 10), *Cronen* (Pet. at 18 n. 16) *Foggs* (Pet. at 15) and *Bennett* (Pet. at 14). Therefore, Petitioners' food stamp authorities do not present any conflict with the Ninth Circuit's decision in the instant case.

Turning to Petitioners' second class of cases — those involving insurance — *Markowitz v. United States*, 650 F.2d 205, 206 (9th Cir. 1981) disposes of this point:

> The source of any damages ... would be state funds even if paid by an insurance carrier. Such carriers would pay only because of premiums ***paid by the state***. The Eleventh Amendment immunity should not be made to turn on whether or not the state is a self-insurer. [emp. added]

Accord, *In re San Juan Dupont Plaza Hotel Fire Litigation*, 888 F.2d 940, 945 (1st Cir. 1989). Using a multi-factor

analysis similar to that used by the Ninth Circuit below to determine the Eleventh Amendment issue, *id.*, at 942, the Court found, *inter alia*, that 72.9 per cent of the state entity's funds came from the state's general funds and that the state would pay any judgment. *Id.*, at 943 (Puerto Rico was the "state"; immunity was upheld). Clearly, Petitioners' insurance cases present no relevant conflict here.

Finally, Petitioners cite four civil rights cases (three involving employment) and one wrongful death case. *Fernandez v. Chardon*, 681 F.2d 42 (1st Cir. 1982) (Pet. at 15) may be disposed of quickly. After citing *Edelman*, 415 U.S. at 677, the Court found that the relevant funds were "state and federal funds intermingled." *Fernandez*, 681 F.2d at 59. As a result, the back pay award (for educational administrators) was barred by the Eleventh Amendment because "[t]he Commonwealth [of Puerto Rico] here cannot avoid using state funds to pay the award". *Id.*, at 60.[4]

Cannon v. Univ. of Health Sciences, 710 F.2d 351, 353 (7th Cir. 1983), characterized by Petitioners as a reimbursement case (Pet. at 12 n. 6), involved claims of age and sex discrimination by women under 30 seeking admission to medical schools. Paraphrasing *Edelman*, the Court upheld Eleventh Amendment immunity because "it is a 'virtual certainty [that any damage award will] be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action.' 415 U.S. at 668" (brackets by the Court). *Cannon*, 710 F.2d at 357. *Kroll v. Board of Trustees of Univ. of Illinois*, 934 F.2d 904 (7th Cir. 1991), also characterized by Petitioners as a reimbursement case (Pet. at 12 n. 6), was a suit for wrongful

[4] The principal issue In *Fernandez* was whether the statute of limitations barred plaintiffs' claims of political discrimination under 42 U.S.C. § 1983. *Id.*, at 48-55. The Eleventh Amendment issue was secondary.

discharge under 42 U.S.C. § 1983 where the Seventh Circuit simply followed its earlier decision in *Cannon*. *Kroll*, 934 F.2d at 908. Significantly, the Court pointed out that "[e]ach state university exists in a unique governmental context", so that "[t]his determination [of immunity] requires a fairly fact-intensive analysis." *Id.*, at 908 n. 2. The governmental context of the University herein, where the federal government will "pay directly" any judgment rendered in this lawsuit, could not be more unique.

In their struggle to demonstrate a relevant conflict among the circuits, Petitioners rely most strongly upon *Mascheroni v. Board of Regents of Univ. of Cal.*, 28 F.3d 1554 (10th Cir. 1994) (Pet. at 9, 10, 19). Despite the Court's passing mention of "a contract with the United States Department of Energy", *id.*, at 1556, that action involved a federal Title VII claim of national origin discrimination in employment, coupled with a few supplemental state tort and contract claims. *Id.*, at 1556, 1557. However, the federal claim was barred by the statute of limitations. *Id.*, at 1563 ("untimely"). As a result, the Eleventh Amendment issue there, unlike that in the instant case with its federal claim under 42 U.S.C. § 1983, involved only state-law claims. *Id.*, at 1557.

Clearly, federal jurisdiction over those state-law claims was tenuous at best, since 28 U.S.C. § 1367(c) provides that:

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if — ... (3) the district court has dismissed all claims over which is has original jurisdiction.

Neither diversity nor any other possible basis for federal jurisdiction is mentioned in *Mascheroni*.

Nonetheless, the Court raised the Eleventh Amendment issue *sua sponte*, *id.*, at 1556-57, as it had done previously in *Esparza v. Valdez*, 862 F.2d 788, 794 (10th Cir. 1988), and went on to find immunity without the slightest reference to the Contract between the University and the DOE for the management of the Los Alamos National Laboratory. *Mascheroni*, 28 F.3d at 1559-60, conceded by Petitioners (Pet. at 10 n. 4 and 19).[5] No provision of that particular Contract appears in the opinion (nor in the record herein), and Petitioners baldly assert that it was "a like contract with the DOE" (Pet. at 19). Respondents submit that this Court should not base its decision upon speculatory assumptions about the contents of the Los Alamos Contract.[6] In addition, even *Mascheroni* recognizes the relevance of "the degree of state funding the entity receives". *Id.*, at 1559. A subsequent Tenth Circuit decision involving reimbursement of federal welfare benefits followed *Mascheroni* and upheld Eleventh Amendment immunity "because the funds to satisfy the award 'must inevitably come from the general revenues' of the state. *Edelman* ..." *Johns v. Stewart,* 57 F.3d 1544, 1553 (10th Cir. 1995), at 1552 & 1554 citing *Mascheroni*. Therefore, Petitioners have failed to demonstrate a conflict between *Mascheroni* and the Ninth Circuit's decision in the instant case.

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[5] Respondents have been unable to find any mention in either *Esparza* or *Mascheroni* of briefing by the parties on the Eleventh Amendment issue. None of the parties in either case raised this issue. *Esparza*, 862 F.2d at 793; *Mascheroni*, 28 F.3d at 1558. Without such adversarial briefing, these appellate opinions may have little value.

[6] Even if one assumes, *arguendo*, that the Los Alamos Contract contained an indemnification provision of some kind, one cannot fairly assume that it also contained a broad promise by the federal government to "pay directly" *any* judgment rendered in that lawsuit, whether based on a nuclear accident, employment discrimination, or otherwise.

While Petitioners mention *Lujan v. Regents of the University of Cal.*, 69 F.3d 1511 (10th Cir. 1995) only in a footnote and characterize it as another reimbursement case (Pet. at 14 n. 8), an examination of the federal indemnification statute involved there is worthwhile because it underscores the fundamental difference between reimbursing and paying directly.

The plaintiff in *Lujan* relied upon a provision of the Price-Anderson Act, 42 U.S.C. § 2210(d), for federal indemnification of the University for any damages she might be awarded for the death of her daughter from alleged nuclear radiation from the Los Alamos National Laboratory. *Id.*, at 1522 and 1513. Nowhere in these subdivisions, which are limited to nuclear incidents, is there a provision to "pay directly" any judgment, claim or cost of litigation. Unlike the Contract between the DOE and the University herein, § 2210(h) imposes severe qualifications and conditions on the indemnification provided by the government, including delays in any money that may — or may not — be paid to the person or entity indemnified. That is, a Commission or the Secretary of Energy "*may* approve the payment of any claim under the agreement of indemnification" (emp. added). The government may settle a claim, but "[s]uch settlement shall *not* include *expenses* in connection with the claim incurred by the person indemnified" (emp. added).

To even qualify for indemnification, a DOE contractor may be required to purchase insurance at its own expense. Subdivision (d)(2) provides that "the Secretary may require the contractor to provide and maintain financial protection", and limits indemnification to claims "above the amount of financial protection required". Clearly, there is no resemblance between the possibility of indemnification in *Lujan* and the direct payment provided here.

Moreover, the *Lujan* Court held that the plaintiff's federal claims were barred by the statute of limitations, 69 F.3d at 1513, leaving only her state-law claims, which were not covered by the Price-Anderson Act. *Id.*, at 1523. Since there was no obligation for the federal government to indemnify the plaintiff, the Court did "not reach the question of whether the Eleventh Amendment applies to a claim that would *ultimately* be paid from federal — not state — funds." *Ibid.* (emp. added). The Court concluded (at 1523) that:

> As to those [state-law] claims, any recovery would have to come from "public funds in the state treasury," making the claims against the state and thus barred by the Eleventh Amendment. [citing *Edelman* at 663]

The Court's reference to "a claim that would *ultimately* be paid" supports Petitioners' characterization of *Lujan* as another reimbursement case (Pet. at 14 n. 8). Clearly, both *Lujan* and *Mascheroni* — involving state-law claims and possible reimbursement — have no relationship to the instant case, with its federal claims and direct payment by an agency of the federal government.

III. THE NINTH CIRCUIT'S DECISION IS FULLY CONSISTENT WITH THIS COURT'S DECISIONS, HAS NO IMPACT UPON STATE SOVEREIGN IMMUNITY, AND IMPOSES NO PRACTICAL BURDEN WHERE A DEFENDANT SUCH AS THE UNIVERSITY GETS A FREE RIDE FROM THE FEDERAL GOVERNMENT.

Contrary to Petitioners' assertions, the narrow issue presented here does not "arise[] frequently" and has not "divided the circuits" (Pet. at 21). Not one opinion cited by Petitioners — not even *Mascheroni* — mentions direct payment of judgments by the federal government nor discusses the significance thereof. Nonetheless, Petitioners speak of "protecting the States from having to appear and defend suits in the federal courts" (Pet. at 21), and cite a recent decision of this Court on "the coercive process of judicial tribunals" (Pet. at 22, citing *Seminole Tribe of Florida v. Florida*, ____ U.S. ____ (slip op. at 12-13) (No. 94-12, March 27, 1996). They also assert "[t]he importance of States' dignitary interests in being immune from federal court jurisdiction", citing *Hess v. Port Authority Trans-Hudson Corp.*, ___ U.S. ___, 115 S.Ct. 394 (1994) (Pet. at 23).

As before, Petitioners continue to ignore the unique provision in the Contract between the University and the DOE for direct payment by the federal government of "all final judgments, including assessed costs and all costs and expenses of litigation and claims, including attorney fees" (subdivision (c), App. at 36a). They also ignore the corresponding statement in the letter of November 23, 1993 from DOE management to Plaintiff Doe, that "the Department [of Energy] will bear the cost of defending the University and the Laboratory, and of any monetary judgment in your favor which may be rendered by the courts" (Appendix I hereto at 3). Moreover, the University has "the power to sue and be sued" (App. at 8a, quoting from the California Constitution). In reality, Petitioners'

"coercive process" is nothing more than an all-expenses-paid experience for attorneys representing the University at the expense of *federal* — not state — taxpayers, where the federal government also picks up the tab and "pay[s] directly" any judgment rendered against the University.[7]

Petitioners' reliance upon *Hess* is puzzling (Pet. at 23-24), since this Court expressly held that "the impetus for the Eleventh Amendment [is] the prevention of federal court judgments that ***must*** be paid out of a State's treasury. *Hess*, ___ U.S. at ___, 115 S.Ct. at 404 (emp. added). This Court repeated that principle again, observing (at 406) that:

> Both Circuits [Second and Third], in accord with the prevailing view, see *supra*, at 404-405, identify "the 'state treasury' criterion — on whether any judgment ***must*** be satisfied out of the state treasury — as the most important consideration" in resolving Eleventh Amendment immunity issues. [emp. added]

Petitioners' quotation from *Pennhurst*, 465 U.S. at 101 n. 11 regarding a judgment that "would expend itself on the public treasury or ... restrain the Government from acting" (Pet. at 24) is also puzzling, since Respondents seek prospective injunctive relief against the University's managers of the

[7] Petitioners' suggestion for "summary action" herein based on a statement in *Seminole* (slip op. at 12) that "the relief sought by a plaintiff suing a State is irrelevant to the question of whether the suit is barred by the Eleventh Amendment" is erroneous and misleading (Pet. at 22 n. 19). This Court merely distinguished between "prospective injunctive relief rather than monetary relief", noting that "[i]t would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State simply because no money judgment is sought". *Ibid*. There was no discussion of direct payment of a judgment by the federal government. Rather, the issue in *Seminole* was the power of Congress to abrogate a State's immunity under the Eleventh Amendment (slip op. at 1).

LLNL based on procedural violations of federal security clearance regulations.[8] The impact of an injunction would be limited to official-capacity state defendants, such as the Director of the LLNL; there would be no impact on any state entity as such. *Cerrato v. San Francisco Community College District*, 26 F.3d 968, 973 (9th Cir. 1994) (enjoining prospective hiring of plaintiff under 42 U.S.C. § 1983 is not barred by Eleventh Amendment). Even reinstatement to a previously-held position constitutes prospective relief. *Lassiter v. Alabama A & M University*, 3 F.3d 1482, 1485 (11th Cir. 1993). See also *Ramirez v. Puerto Rico Fire Service*, 715 F.2d 694, 697 (1st Cir. 1983) (reclassification and placement on the fire department's roster for future employment is "a classic form of prospective remediation"). *Hess* emphasized the importance of protecting a state's treasury, and this Court has held that suits under 42 U.S.C. § 1983 for injunctive relief against official-capacity state defendants are not barred by the Eleventh Amendment. *Will*, 491 U.S. at 71 n. 10, followed in *Hafer*, 502 U.S. at 27; accord, *Puerto Rico Aqueduct*, 506 U.S. at 146, 113 S.Ct. at 688-89, citing *Ex parte Young*, 209 U.S. 123 (1908). Clearly, the Ninth Circuit's opinion herein is fully consistent with applicable precedents of this Court.

Moreover, Petitioners' confusion of sovereign immunity with Eleventh Amendment immunity does not serve their cause (Pet. at 21-29). According to Petitioners' own authority, "[i]f the Eleventh Amendment only applied where the state was immune from suit, it would be superfluous." *Lujan*, 69 F.3d at 1522 (Pet. at 14 n. 8).

[8] Petitioners erroneously conclude that Plaintiff Doe's § 1983 claims are barred by *Edelman* and ignore federal diversity jurisdiction over his contract claims (Pet. at 24-25, nn. 21 & 22). Yet, on the very next page, they admit diversity jurisdiction ("[d]iversity cases such as this case...") but ignore the predominance herein of the federal civil rights claim under 42 U.S.C. § 1983 (Pet. at 26 n. 23).

Indeed, the University itself has "the power to sue and be sued", at least in state courts (Cal. Const., art. 9, § 9(f), cited by the Ninth Circuit below, App. at 8a). Since the federal government will "pay directly" any judgment rendered against the University — whether rendered in state or federal court — Petitioners have negated the foundation of their own argument by the following statement (Pet. at 22):

> Once a State has consented to suit in its own courts, suit in federal court should not lead to any more financial impact on the State than suit in State courts, ...

Since this suit against the University in federal court will have no financial impact whatsoever on the University, the State of California, nor any of its components, Petitioners' contentions regarding sovereign immunity — and even the Eleventh Amendment itself — must fail. For the sake of completeness, however, we turn to Petitioners' argument on the "practical implications of the ruling below" (Pet. at 26-29).

Regarding practical implications, Petitioners' merely rehash their previous arguments and continue to harp on irrelevant factors such as reimbursement (and eventual recoupment) (Pet. at 27-29). They urge this Court to simplify Eleventh Amendment jurisprudence at the expense of citizens who desire to have their federal security clearance claims decided by federal courts. If Petitioners had their way, the mere appearance of the name of a state in a defendant's name would trigger immunity. Implicitly rejecting such an approach by applying the established five-factor analysis, the Ninth Circuit denied immunity to the California Exposition & State Fair. *ITSI TV*, 3 F.3d at 1292-93. Respondents submit that Eleventh Amendment determinations should be based on facts and not merely labels.

Petitioners complain of "fact-intensive mini-trials" (Pet. at 27), but fail to cite even one case in which that occurred. The "fact-specific inquiry" mentioned in *Doucette*, 947 F.2d at 29, is hardly a trial, and Petitioners admit that *Doucette* is a "reimbursement" case (Pet. at 28). They object to "a detailed audit of the defendant's finances to determine whether the defendant department or subdivision is indeed 'the state'", citing *Paschal*, 936 F.2d at 944 (Pet. at 28). But *Paschal* is admittedly another reimbursement case (Pet. at 12), and the Court itself observed that "it is not altogether clear that total reimbursement from the federal government to the states is a sure thing. Title 42 § 502(a) ..." *Id.*, at 944. The instant case, wherein the federal government will "pay directly" any judgment against the University, stands in sharp contrast to Petitioners' authorities.

Petitioners also complain of "burdensome discovery" and argue for "a threshold immunity from suit" (Pet. at 27 & 28), but fail to explain why they engaged in discovery for almost one year before moving for dismissal under the Eleventh Amendment (Pet. at 5-6 for dates). They also fail to state that the Contract between the DOE and the University is a public document, available under the Freedom of Information Act and the equivalent California statute, so that their argument regarding discovery is inapposite. Finally, Petitioners contend that "an award of damages against the University could affect future University-DOE contracts" (Pet. at 28 n. 24), but ignore the fact that the DOE would "pay directly" a state court judgment as well as a federal court judgment, and that both judgments necessarily would be equal. Indeed, Petitioners have contradicted their previous argument in which they criticized as "unfounded speculation" a Court's conclusion that higher insurance premiums would result from federal litigation, *San Juan Dupont Plaza*, 888 F.2d at 945, correctly pointing out that the state entity there could "sue and be sued" in state courts (Pet. at 18). Given that Plaintiff Doe can obtain identical money judgments in a state or federal

court, either of which judgments will be paid directly by the DOE, one wonders why Petitioners object so strenuously to federal jurisdiction, especially when this case may turn on a procedural question of federal security clearance law.

In short, the ruling below has no practical implications beyond the specific and unique facts of this case, because the federal government will "pay directly" — not reimburse — any judgment rendered against the University. Respondents submit that the simplistic and intellectually lazy approach to Eleventh Amendment adjudication urged by Petitioners is contrary to this Court's established jurisprudence.

CONCLUSION

The University's Petition for a Writ of Certiorari should be denied. Since this case is *sui generis* in the extreme, granting certiorari would not resolve any of the conflicts asserted by Petitioners. Contrary to Petitioners' assertions, this case does not involve reimbursement, recoupment or insurance, but the direct payment of any judgment by the DOE, so that there is no potential impact upon either the treasury of the University or that of the State of California. Petitioners should not be permitted to bootstrap their misstatement of the "Question Presented" to create conflicts among the circuits nor an "important question of federal law" within the meaning of Supreme Court Rule 10(c). The federal civil rights issues presented by this case, under 42 U.S.C. § 1983, should be decided by federal courts. The contract claim as such is secondary, and its resolution may turn on a question of federal security clearance procedures.

The detailed factual analysis employed by the Ninth Circuit below was necessary, proper, and consistent with this Court's precedents; the automatic, blind approach suggested by Petitioners flies in the face of this Court's jurisprudence and would give excessive and unnecessary breadth to Eleventh Amendment immunity.

Dated: May 13, 1996

Respectfully submitted,

Richard Gayer

RICHARD GAYER, ESQ.,
Attorney of Record for
Plaintiffs-Respondents
JOHN DOE, Ph.D., and all
others similarly situated.

Appendix I

Department of Energy

San Francisco Operations Office
1301 Clay Street
Oakland, California 94612-5208

Nov 23 1993

Dr. B[] G[]
[street address]
New York, New York [zipcode]

Dear Dr. G[]:

This is in response to your telephone conversation with me earlier this month concerning the Lawrence Livermore National Laboratory's (LLNL's) withdrawal of its offer of employment to you in June 1991. Based upon a review of the correspondence in this matter, there appear to be two major issues in this controversy.

The first of these issues concerns the reasons given by various Laboratory employees at different times for the withdrawal of the offer of employment. In retrospect, it appears that the Laboratory was not entirely candid with you in initially defending its decisions as based on security concerns and concluding that you were not a viable candidate for a security clearance. In his letter of September 25, 1992, the Manager of the San Francisco Field Office concluded that the Laboratory process for documenting its decision and conveying that information to you was unsatisfactory. As you know, that letter went on to clearly state the Department's policy that employment decisions cannot be made on the basis of security clearance determinations which are solely within the province of DOE, while recognizing that the Laboratory was solely responsible

for determining that an applicant is qualified and suitable to perform the duties of that position.

The SF Manager also requested that the Laboratory review your case and determine if there were additional actions LLNL should take. As you know the Laboratory subsequently reaffirmed its decision not to hire you, apparently on grounds other than its conclusion as to whether you were a viable candidate for a security clearance. Based upon your conversation with me and other SF personnel, you view the different statements by various Laboratory employees at different times as inconsistent and intellectually dishonest. You also believe that the SF review of this matter, in your words, was "fraudulent."

The second major issue in your case is whether your accepted the Laboratory's offer before it was withdrawn, thereby creating a valid contract. I am informed that this is a purely technical legal issue.

Our records reflect that you filed a complaint with the Office of the Inspector General for the Department in October 1991, and that Congressman Bill Green wrote to the Department on your behalf in the same month. You subsequently initiated litigation against the Department, the University of California and LLNL Director John Nuckolls based on the Laboratory's decision not to hire you. Depositions of the SF Manager and LLNL employees involved in this matter were taken. Thereafter, the Complaint was amended to eliminate the Department as a defendant. The U.S. District Court in San Francisco later granted the University's Motion to Dismiss UC, and John Nuckolls, in his official capacity, as defendants based on the 11th Amendment of the United States Constitution. I understand that your action against Director Nuckolls, in his personal capacity, continues in federal court, and that you have filed an appeal with the 9th Circuit U.S. Court of Appeals.

The substance of your complaint, and action you request, is that the Department should do the right thing and direct the Laboratory to hire you. This would also permit the Department to determine your eligibility for a security clearance. I believe that the Department has done everything it can legally do under the circumstances of your case, and I cannot take the action you have requested.

The Lawrence Livermore National Laboratory (LLNL) is a Government-owned facility which is primarily funded by the Department of Energy. The University of California manages and operates LLNL for the Department, and the rights and obligations of the University and the Department are defined by Contract Number W-7405-ENG-48. Under the contract, the Department does not have the right to substitute its judgment as to your qualifications and suitability for employment for that of the Laboratory and direct that you be hired by the Laboratory. (This is generally the case under all Government contracts.)

Likewise, under the contract in existence at the time you filed your lawsuit, the Department did not have the contractual right to approve or direct the University and the Laboratory's defense against your action, and cannot direct that it be settled. However, absent clear and convincing evidence of bad faith or willful misconduct of the Laboratory Director, the Department will bear the cost of defending the University and the Laboratory, and of any monetary judgment in your favor which may be rendered by the courts. Therefore, we believe that we must await the outcome of your litigation and that it would be inappropriate to further comment on the merits of your case.

Moreover, allegations of fraud, waste and abuse are within the exclusive jurisdiction of the Department's Office of Inspector General. In this respect. I understand that the OIG continues to be interested in your case.

Finally, I am also aware that, since the withdrawal of LLNL's offer of employment in June 1991, you have sought to resolve your grievance informally at the highest levels of the Department, the executive and legislative branches of the federal government, the University of California and the state government. I can also understand your frustration that two years of conscientious and persistent effort on your part has not been able to resolve the issues. I also know that our position in this matter is unacceptable to you. However, I believe that the Department has done everything it can legally do under the contract with the University of California, and that we must await the outcome of your litigation.

Sincerely,

[Signature]

Martin J. Domagala
Acting Deputy Manager

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-1694

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioners,

v.

JOHN DOE, Ph.D., et al.,
Respondents.

PROOF OF SERVICE BY MAIL

I, Richard Gayer, am the attorney for Plaintiffs-Respondents JOHN DOE, Ph.D., and all others similarly situated in this case.

On May ___, 1996, I mailed three copies of the attached Respondents' Brief in Opposition to the attorneys for the defendants-petitioners at the following address:

Charles Miller, Esq.
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044

I certify under penalty of perjury that the foregoing is true and correct.

Dated: May ___, 1996

RICHARD GAYER, ESQ.,
Attorney of Record for
Respondents JOHN DOE,
Ph.D., et al.